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HON. ALBERT CLARKE,

OF ST. ALBANS,

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CAN THE STATE CONTROL RAILROADS? SHOULD IT PROTECT THEM FROM DEPLETION AND ITSELF FROM CORRUPTION?

[In the Vermont Senate, November 13, 1874, Senate Bill No. 5, an act to prohibit railroad and steamboat companies from granting free transportation to state officials or to others, except upon the business of the companies, or in exchange with other companies, came up for consideration upon the question of its engrossment and third reading. A majority of the committee on railroads, of which Senator Wilson, of Windsor County, was chairman, had reported against it, and a minority, consisting of Senator Reynolds, of Grand Isle County, had reported in its favor. The subject had engrossed considerable attention and the Senate chamber was thronged, chiefly by members of the House of Representatives. The vote stood: yeas, 3; nays, 27.]

Senate Bill No. 5 being taken up as the special order, MR. CLARKE said:

Mr. President: I approach the discussion of this bill with hesitation, for I must necessarily consume an hour of the Senate's valuable time, and with no expectation of overcoming the predetermination of any man. But as those who oppose the bill have brought to bear all the prejudice against its passage which could be found outside the realm of argument, I shall be pardoned if I endeavor to present some views more worthy of legislative consideration. If, in doing this, I shall have the misfortune to say aught that may fall uncomfortably near the principles or practices of any gentlemen upon this floor, or in other high positions of the state, I beg that they will bear in mind that it is only the system, and not its adherents, that I intend to assail, and as the turn given to the discussion by those who are understood to represent the railroads, or rather the one railroad management which manifests uneasiness whenever its hold upon public influence is threatened, brings up the important question of the constitutional right of the state to exercise control over its corporations, the occasion seems to me opportune for beginning an inquiry as to what powers we have conferred and what we have left, because, unless I mistake the tendencies of our time, questions of regulation, considered by many as greatly transcending in importance the particular one in hand, must soon be determined on the same general principles.

NATURE AND EFFECT OF THE FREE PASS SYSTEM.

But, sir, the abuse that has crept into our body politic, and circulated there until it has reached the utmost tissues, is one which deserves serious consideration by the conservators of good government, and we are called upon to consent no longer to a species of favoritism, somewhat outside of the law, to be sure, but still behind the law and touching all the secret springs of public action; that has known no parallel in this country; that is unrepublican in its very nature; that makes distinction between the equal citizens of a free state; that establishes a hateful system of caste, dependent upon the sovereign pleasure of a few men; that rewards no merit, but endows the creatures of temporary or accidental fortune; that makes the rich richer and the poor poorer; that does not shed its rain alike upon the just and the unjust, but the sole tendency of which is to make the just unjust and to blind the eyes of the wise; that invades the marts of business and helps one man to fortune while his rival fails; that enters the arena of politics, packs conventions, conquers principle, and changes votes; that lurks within the very corridors of the Capitol and tarnishes the ermine of the Bench; that makes the trustee forgetful of his honor, and depletes the revenues of his trust estate; that unseats the laws

of business and erects instead a mere prerogative, whose exercise is followed by either fawning or resentment, giving birth to unmanly and vexatious importunities and a wide range to such subserviency and discontent as it is the policy of free institutions to discountenance and prevent. It is, in every essential particular, the same hateful and odious thing that has made kingly power distasteful to mankind. It is the handiest instrument of corruption, and the ready lash of petty despotism. It is the fatal ooze that is undermining the foundation stones of liberty and equality upon which our government is built. It is a growing danger which the interests of the state and the interests of the corporations alike call upon the sovereign power of the state to check.

GROUNDS OF OPPOSITION TO THE BILL.

But when I interrogated the majority of the committee who reported against this bill the other day, we were told that the state has no power in some instances to correct this abuse, because a few years ago it chartered certain companies without reserving to itself any control over their franchises and functions, and that they now enjoy those privileges under all the sacred guaranties of a contract, the obligation of which it would be unconstitutional for us to impair. The honorable Senator from Windsor [Mr. Wilson] also told us that the passage of this bill would be an invasion of private right, as much as it would be for the legislature to declare that one neighbor should not convey another in his carriage without hire, or for one friend to extend to another the hospitality of his table without reward. In response to inquiries he said there was no opposition to this bill before the committee; but somehow the majority came to the remarkable conclusion that not only was such legislation not asked for by the roads, but, on the contrary, was an attack upon them. Are we, then, to infer that had the majority of the committee been satisfied that the railroads did ask for such legislation it would have been more likely to be recommended? I know not why, when we sit here to give our votes in such a manner as we " shall judge will most conduce to the best good " of the State of Vermont, we should be influenced by any considerations of who asks for or who does not ask for legislation, but be governed only by the right and the propriety of whatever may be proposed. I fear, sir, that the suggestion of that unfortunate objection betrays the too widely prevalent spirit of solicitude for the wishes of the few who govern the corporations, instead of the interests of the many who govern, or ought to govern, the state; and while I do not in the least question the honorable intentions and independent judgments of the majority of the committee, and have the highest respect for the legal talent which has discovered a constitutional objection to this bill, I confess to have been lost in wonder, since no open opposition was made to it, as to the reasons for their belief that it is " an attack upon the roads," when, by its terms, it promises to give them immeasurable relief. What is there, either in the provisions of the bill or in any advocacy that it has received, in the committee room or on this floor, that indicates the least hostility to the railroads or to any of their customs that would not be confessedly " more honored in the breach than in the observance "? Whence came the suggestion of this alleged hostility? I would most gladly believe that it did not emanate from the interested clamor of outside parties, whose peculiar tactics are the *argumentum ad hominem*, the misrepresentation and abuse of opponents, rather than the courageous and manly encounter of facts and conclusions and the consideration of measures upon their plain and simple merits.

But this is neither here nor there, and I will proceed to notice the constitutional objections, suggested by the majority, although I think they need no further

refutation than is found in the clear and able report of the minority of the railroad committee. I suppose, sir, that the majority rely upon the decision of the Supreme Court of the United States in the Dartmouth College case, which was rendered on the second day of February, 1819, in support of their position that a charter is a contract between the state and the corporation, which invests the latter with certain private rights that cannot be invaded, and places the former under certain obligations of non-interference that cannot be impaired without consent. In order that we may arrive at a correct understanding of that case and be the better able to appreciate the points that have any bearing on the subject now under consideration, I will briefly summarize its history and consider the principles involved.

THE DARTMOUTH COLLEGE CASE.

In the year 1754 the Rev. Eleazer Wheelock, D.D., founded an Indian Charity School upon his own estate and afterward sent an agent to England, who procured valuable contributions for its endowment from the Right Honorable William, Earl of Dartmouth, and other distinguished Englishmen. On the 13th day of February, 1769, a charter was granted by King George the Third, incorporating Dr. Wheelock, Gov. John Wentworth of the Province of New Hampshire, and ten other gentlemen in New Hampshire and Connecticut as trustees of said funds, under the name and style of the *Trustees of Dartmouth College*. The charter was in the usual form of those days and conferred upon the trustees the right to fix upon the location of said school, to accept grants of real and personal estate, to sue and be sued, to have succession, to appoint instructors and agree upon their salaries, and finally to do whatever should become necessary for the promotion of the end in view as a natural person or other body politic could do by the laws of Great Britain or the Province of New Hampshire. This charter did not, however, authorize the trustees to take land against the will of the owner, upon making compensation therefor, known as the right of eminent domain, and it did not reserve to either the home or provincial government any right of control over the affairs of the college, or to alter, amend, or repeal the charter. The trustees accepted the charter, organized under it, and continued in its uninterrupted enjoyment until the year 1816, when the Legislature of the State of New Hampshire, desiring to enlarge the capacity and functions of said school from a college to a university, passed an act to that effect, increased the number of trustees from twelve to twenty-one, and conferred upon them the same franchises, rights, and property which had existed in the trustees of Dartmouth College, except as is otherwise therein stipulated. It also provided for a board of twenty-five overseers, with power to appoint the president and professors, fix their salaries, establish colleges and professorships and erect new buildings, and, in short, effectually to absorb and supplant the old institution and to supersede the common law right of visitation and government vested in the founders of the charity, by conferring the same upon the governor and council of the state. The trustees refused to accept the act, although their secretary and treasurer went over to the new corporation with the funds, books, and papers, and then the trustees brought suit against him to recover the same. The suit went against them in the supreme court of New Hampshire, whereupon they caused it to be removed on writ of error to the Supreme Court of the United States. The question was, whether the acts of the Legislature of New Hampshire were not invalid under that provision of the Constitution of the United States which declares that no state shall pass any law "impairing the obligation of contracts." This involved a determination of the question whether or not a charter is a contract; also whether such a corporation was not sufficiently a public institution as to be amenable to

the legislature and also, to some small extent, whether the separation of this country from Great Britain had not had the effect to render nugatory the charter granted by the king, so far, at least, as to render it subject to revision by the state. I do not understand that this last point was seriously insisted upon, but Daniel Webster, in his great argument in behalf of the college, incidentally made another point, and that was, that by the New Hampshire Bill of Rights no person could "be deprived of his property, immunities, or privileges . . . but by judgment of his peers or the law of the land." The case was argued at great length by four as distinguished lawyers as there were in the United States at that time, Mr. Webster being opposed by Attorney-General Wm. Wirt, and five of the six justices in attendance concurred in deciding that the acts of the New Hampshire Legislature were unconstitutional in that they impaired the obligation of the charter, which was a contract, and the opinions of Chief Justice Marshall, Justice Bushrod Washington, and Justice Joseph Story are among the most luminous expositions of American law that the books contain. The case was reported in full in the fourth volume of Wheaton's Reports, and there is no other book in the state library that has been in equal demand during this session. The margins around the chief justice's opinion are literally black with reference marks, and I make no doubt that at this moment two or three honorable gentlemen are anxiously waiting to impale me on their bristling points.

But I will relieve their anxiety in quite another way. I hope I was too well bred to the profession not to accept the law of that case as the law of the land in similar cases. I fully concur in what Chief Justice Marshall said, that

> "This is plainly a contract to which the donors, the trustees, and the crown (to whose rights and obligations New Hampshire succeeds) were the original parties. It is a contract made on a valuable consideration. It is a contract for the security and disposition of property. It is a contract on the faith of which real and personal estate has been conveyed to the corporation. It is, then, a contract within the letter of the constitution and within its spirit also."

I agree to what Mr. Justice Washington said, that

> "The only rules for the government of these private corporations are the laws and constitutions assigned by the founder. . . . Although the king, by the grant of the charter, is in some sense the founder of all eleemosynary corporations, because without his grant they cannot exist, yet the patron or endower is the perficient founder, to whom belongs, as of right, all the powers and privileges which have been described. . . . With such a corporation, it is not competent for the legislature to interfere."

And I accept what Mr. Justice Story said, that

> "When a private eleemosynary corporation is thus created by the charter of the crown, it is subject to no other control on the part of the crown than what is expressly or implicitly reserved by the charter itself. Unless a power be reserved for this purpose, the crown cannot, in virtue of its prerogative, without the consent of the corporation, alter or amend the charter or divest the corporation of any of its franchises, or add to them, or add to or diminish the number of the trustees, or remove any of the members, or change or control the administration of the charity, or compel the corporation to receive a new charter. This is the uniform language of the authorities, and forms one of the most stubborn and well-settled doctrines of the common law."

NOT A PARALLEL.

After all these admissions it may at first be thought that, so far as this bill would apply to railroad corporations whose charters did not contain the reservation of legislative control, it must be unconstitutional. But I shall hope to show by equally good authority, and largely by the same authority, that not only are the two cases in no important sense parallel, but that even if they are, the enactment

of this measure will be entirely constitutional as to other corporations, and equally so as to them unless they refuse to accept it. But before proceeding to enlarge upon these points, let us, both as a matter of history and as a part of the argument, glance at the charters alluded to and examine the legislative proceedings in connection with their enactment.

THE EARLY VERMONT CHARTERS AND HOW PROCURED.

Vermont began to charter railroad companies about the year 1831, but all of the charters expired by limitation before the necessary capital could be secured and the organizations effected. In 1835 the charter of the Connecticut & Passumpsic Rivers Railroad was granted, but it became of no avail until 1843, when it was revived by a special act. I notice that this, like all of the earlier charters, conferred upon the directors full power to fix tolls, but made the same subject to revision by the supreme court on application by any ten freeholders in any town through which the road should pass, but not so as to reduce the net income of the roads below twelve per cent. on the capital stock for the first fifty years, and six per cent. thereafter. The charter contained no clause reserving to the legislature any sort of control, but it did require the corporation [and the language of the requirement shows how little was then known about railroads] "to keep constantly exposed to view, at all places where they shall have toll houses, or gates, and all public places where they may receive passengers, or freight, a sign, or hand-bill, with the rates of toll, or charge, legibly written or printed thereon." We have all, doubtless, seen pictures of the first train of cars that ran in America, and I submit that it was not more crude in any of its mechanical proportions and appointments than were the laws which at that time endowed the corporations with life and power. The charter also required the corporation to keep books and accounts, and stipulated that they "shall at all times be open to the inspection of any committee of the legislature, or the supreme court." Was this a mere meaningless clause, thrown in for the sake of securing legislative assent, or did it not rather assert the visitatorial power of the legislature, with all the implied consequences of revision and correction?

The Vermont Central charter, which was granted in 1843, contained substantially the same provisions, and following the clause exempting the property from taxation was a reservation of the right of the legislature to reduce the tolls if they should yield a net income to exceed ten per cent. per annum on the cost of construction, or, in lieu of such reduction, to require the excess to be paid into the state treasury. You see that the honest legislators of that year (when our present youngest senator, Mr. Page of Lamoille, was born) were simple enough to believe that this road was going to prove immensely profitable, and in fixing the maximum profit that the corporation should enjoy, they never once thought that the power of the legislature might need to be invoked to guard against the minimum. In their zeal for turning into the state treasury the surplus income, they did not imagine how it could be frittered away in gifts or sunk in misadventures. But still there were some prudent men in that day who, although they could not pretend to foreknow the events of the new development, yet deemed it wise for the state of Vermont irrecoverably to surrender to no creature of its creation any of the sovereignty existing in the people.

The 23d day of October, 1843,— if the state has no power over these corporations outside of the express reservations in their charters,— is the day when all our troubles in this regard began, if it is not indeed the day when Vermont ceased to be a free and independent state. For on that day the Brattleboro & Fitchburg

charter being under consideration, Mr. Davis of Norwich moved to amend by adding:

"Section 21. This act shall be under the control of future legislatures to alter, amend, or repeal, as the public good may require,"

and the amendment failed, by a vote of 69 to 98. On the same day he was more successful with the Vermont Central charter, for his amendment was agreed to by a vote of 92 to 72, but it was afterward strangled to death in the Senate committee-room, where I find that the same process has not been forgotten yet. It may be interesting to recur to the debate upon his proposition, which I find reported in the Vermont *Watchman*, then edited by our honored friend here, the Senator from Washington [Mr. Walton].

"Mr. Davis, of Norwich, moved to add a proviso that the future legislatures may alter or amend (not repeal) the charter, supported by Messrs. Davis, of N., Sherwood, Folsom, and Henry, who insisted upon the justice and necessity of retaining at least some power in the hands of the state over such corporations; and the latter instanced a recent case in New Hampshire, where an attempt of the Concord company to enforce an exorbitant sum for transmitting the mails was defeated through this power in the legislature. Messrs. Winslow, Everett, and Whittemore opposed the amendment, urging that the Supreme Court had power to regulate tolls, and the state might take the road by purchase; and also that the power to alter or amend was equivalent to the power of repeal, as by the first power the charter might be in fact destroyed by so altering it as to render it useless to the corporators."

Two days afterwards Mr. Davis endeavored to have the same amendment made to the charter of the Passumpsic road, but failed by a vote of 87 to 118. I again quote from the same paper's report of the House proceedings, October 30.

"The Champlain & Connecticut Rivers Railroad charter being under consideration, Mr. Davis, of N., moved to amend, placing this act under the control of the next legislature, remarking that he merely wished the corporators to run the risk of having as wise a legislature next year as this. Mr. Whittemore regarded this question already too well settled to require discussion. Mr. Rice, of Somerset, was willing to take the amendment on the ground that it was a question on which the people had not acted. Mr. Stacy urged that this year was the favorable time to get the stock taken, and if deferred one year he feared it would be fatal to the project. He said that if members were not prepared to act definitely now, he hoped they would go home and consult their mothers. Mr. Sherwood seconded the last suggestion; he thought the mothers of Vermont were too wise to saddle the state with such corporations. Mr. Whittemore treated this amendment as a mere trap, in effect a proposition to submit the corporation to the control of all future legislatures. Mr. Vilas said this was the object, but it was no trap; the trap was on the other side, sprung upon the people to prevent them from expressing their will upon this subject. The amendment was rejected, ayes 89; nays 111."

ABSURDITY OF THE VIEW THAT SUCH CHARTERS MUST GOVERN.

Thus we see that, without previous discussion among the people, a legislature which knew just about as much concerning railroads as we know about the coming navigation of the air was led on by the hope of great benefits to the state, and lashed on by the fear of discouraging capital, to make grants and concessions of power and privilege which nothing would have rendered possible but the most urgent necessity or the feeling of assurance that if any future embarrassments should arise therefrom, the state would, after all, be supreme, for how could the representatives of the people constitutionally "do or consent to any act or thing whatever that" should "have a tendency to lessen or abridge" the "rights and privileges" of the people "as declared by the constitution of this state"? It should be borne in mind, too, that the rejection of those amendments was in each instance by a strict party vote, and thus the most important questions relating to our internal police that have ever come before the legislature were settled, so far as they could be

settled by statute, not upon a pure and unalloyed consideration of their merits, but by the bare preponderance of one organization over another, banded together with reference to national issues alone.

And yet we are now told that such a grant, thus procured, binds us hand and foot for all future time, and that however unconscionable and oppressive it may be, and however much the public interest does or ever may suffer from it, the people through their representatives, or in any other manner, are powerless to obtain relief. Very well, then; if the Jew will have his bond he shall have the whole of it, and if he insists upon his pound of flesh, let him beware that he takes no drop of blood. If it is competent for one party to the "contract" to insist upon its rigorous fulfillment, the other can do so as well. Should the legislature insist upon the terms of those early charters and require the corporations to "keep constantly exposed to view, at all places where they have toll-houses or gates, a sign or handbill with the rates of toll legibly written or printed thereon," how would their present practices and prices look? Let us see:

FREIGHT from Montpelier to Burlington, first class, per 100 pounds	$0.50
If the shipper be a man of wealth and influence	.25
FARE, between stations where there is no competition and the people cannot help themselves, per mile	.04
(and 25 miles shall be reckoned as 35.)	
Where there is competition	.02
For judges, legislators, editors, and leading lawyers	0

Why, sir, such a notice as that would breed a revolution in this state in less than a year unless the people have lost the spirit of their ancestors, and whatever corporation should attempt to enforce such a discrimination, once openly proclaimed, would, as Byron said of a similar but less infamous proposition in the House of Lords, "require twelve butchers for a jury and a Jeffreys for a judge."

THE PUBLIC CHARACTER OF RAILROADS.

But let us recur to the constitutional question and the Dartmouth College case. It should be borne in mind that that case was before the days of railroads. Corporations were neither very beneficial nor very dangerous. What few then existed were comparatively limited and local, and though sustaining certain relations to the public, were to all intents and purposes private in their nature and of as little general influence as this man's style of farming or that man's method of manufacturing. Dartmouth College was treated by all the justices and all the counsel as "a private, eleemosynary institution," which received nothing from the government but the mere right to exist, and owed no obligations that it could not at any time suspend with entire impunity. Throughout the argument and throughout the opinions this one characteristic was made the prominent feature of the case. It was a *private* corporation. The king had reserved no sort of supervision over its affairs. He had not stipulated that its rates of tuition should be posted at the outer and the inner gates. He had not "nominated in the bond" that the books and business should be open to the inspection of a committee of Parliament. He had not required it to make annual reports to the supreme authority of the state. And more than all the rest, he had not endowed it with that attribute of sovereignty to enter upon, take, and hold adversely private lands. The artificial being that he created had no more powers than any natural being. Having given it nothing but breath, it was not competent for the state to take that away, except for cause. Having bestowed upon it nothing, the state had no right to take away that which it had otherwise acquired.

But with American railroads all this is different. They are not local, because they extend from one border to another. They are not private, because the state has accommodated them with a portion of its sovereign powers. They are not charitable or eleemosynary, because they are for business, and their rates and regulations extend through all the ramifications of society. Their tolls are a tax upon what we produce and what we consume. There is no business in the state, from the quarrying in the west to the mining and manufacturing in the east, from the immense lumbering on the lake to the smallest farming on the hills, but what is a hundred times more affected by them than it is by all the laws that we pass here on other subjects, or by all the judgments of our courts. In every practical and essential sense, therefore, they are public and not private, for if it were otherwise, their commercial importance is so great that to all intents and purposes they would be the state and this legislature would be but a mere debating club which they might graciously permit to exist as a means of popular diversion. But I shall show that in a *legal* as well as a practical sense they are public corporations and therefore subject to the control of the state.

They are public: (1) Because they are privileged by the state with eminent domain; (2) Because they are endowed by the state with the franchise of taking toll; (3) Because they are highways and subject to regulation as to public safety and convenience.

And first, as to the power of the state to take private property for anything but a public purpose: It never existed and never could exist without unseating government at once. This question presented itself to the courts on the threshold of railroad construction in America. The late Chief Justice Shaw of Massachusetts, an eminent authority, in deciding the case of Worcester *v.* the Western R. R. Co., 4 Metcalf, 564, held as follows:

"It is manifest that the establishment of that great thoroughfare is regarded as a public work, established by public authority, intended for the public use and benefit, the use of which is secured to the whole community, and constitutes, therefore, like a canal, turnpike, or highway, a public easement. The only principle on which the legislature could have authorized the taking of private property for its construction without the owner's consent is that it was for the public use. Such has been held to be the character of a turnpike corporation, although there the capital is advanced by the shareholders and the income goes to their benefit. (Com. *v.* Wilkinson, 16 Pick. 175.) It is true that the real and personal property necessary to the establishment and management of the railroad is vested in the corporation, *but it is in trust for the public.*"

The supreme court of South Carolina met the same question at about the same time and in the same way. They said:

"But according to the view taken in the circuit decision that the application of the eminent domain of government is, from its essential nature, very various, and to be made according to the successive exigencies of the state, it may be rationally assumed that railroads, although of recent origin, have already become of incalculable public importance; that the enlarged end and object of this great railroad especially is for the transportation and intercourse, commercial and social, of several different states, whose interests are to be ever regarded, and the mutual confidence that belongs to such a work sacredly fulfilled. This characteristic is irreconcilable with the proper conception of a mere private way. . . . Is it not wise to hold such a company, as the guardians or lessees of a great highway, endowed with a public franchise, yet subject to the control which their purposes indicate as necessary and proper for such an establishment, and which the general right to use the road absolutely required?"

In the state of New York, where the first American railroad was built, the character of railroads, whether public or private, first came up to be decided. The distinguished Chancellor Kent decided that they were public, and such has been the uniform character of the decisions of the New York courts, so far as I can discover,

from that day to this. In fact, such has been the general rule, for in almost every state since public aid began to be voted to railways by counties, cities, and towns, cases have arisen which have involved this question. In a matter relating to the validity of certain town bonds, two of the judges of our supreme court, to whom it was referred, expressed the opinion several years ago that it was constitutional for the legislature to enable towns to extend such aid, on the ground that it was for *a public highway.* If railroad companies are mere private corporations, like the trustees of Dartmouth College, then nothing is clearer or better settled than that they could not have the right of eminent domain. The supreme court of our own state has decided a case so recently that it has not yet been reported, but fortunately we have heard of it through the Senator from Orange [Mr. Rowell], who is the official reporter, in which they hold that the private drainage act of 1868 is unconstitutional, for the state cannot authorize the taking of lands for a private purpose without the owner's consent. If any doubt had existed before, this decision, it seems to me, must put it, so far as this state is concerned, at rest; and applying the principle to our railroads, it is clear that since every one of them has been gifted with eminent domain, they must be regarded by the courts, the legislature, and everybody else as public and not private.

But it may be presumed that the sticklers for the Dartmouth College case will be content with nothing short of a decision of the Supreme Court of the United States. Fortunately, we have it. In a case which went up from Wisconsin, not one of the so-called " granger cases," the court say,

" That railroads, though constructed by private corporations, and owned by them, *are public highways,* has been the doctrine of nearly all the courts ever since such conveniences for passage and transportation have had any existence. Very early the question arose whether a state's right of eminent domain could be exercised by a private corporation created for the purpose of constructing a railroad. Clearly it could not, unless taking land for such purpose, by such an agency, is taking land for public use. The right of eminent domain nowhere justifies taking property for private use. Yet it is a doctrine universally accepted that a state legislature may authorize a private corporation to take land for the construction of such a road, making compensation to the owner. What else does this doctrine mean if not that building a railroad, though it be built by a private corporation, is an act done for a public use? And the reason why the use has always been held a public one is that such a road is a highway, whether made by the government itself or by the agency of corporate bodies, or even by individuals, when they obtain their power to construct it from a legislative grant."

Here, then, is the question decided by the highest tribunal in this country, and better still, it is decided in regard to a railroad and not in regard to a college. The honorable gentlemen who think that the *alpha* and *omega* of the law is in the 4th of Wheaton, can no more reverse, ignore, get over, or get around this last great authority than they can turn back the tide of the last thirty years of magnificent development and center all the railroads of the country into the confined dimensions of respectable old Dartmouth Hall.

The determination of the public character of railroads by this question of eminent domain is, therefore, so complete that it seems almost a waste of words to refer to the element of soveriegnty conferred upon them in the right to take tolls. But it makes them doubly the creatures of the state. A decision of our supreme court, reported in the 25th of Vermont, declares that " the right to *build* and *run* a railroad, and *take tolls*, or *fares*, is a franchise of the prerogative character, which no person can legally exercise without some special grant of the legislature." Ex-Chief Justice Redfield, in his book on Railways, page 320, speaking of horse railroads, says:

"It is a franchise to carry passengers and to demand tolls. This is one of the *prerogatives of sovereignty* and only derivable through the action of the legislature. . . . This, then, though an exclusive franchise, so far as the carrying of passengers and taking toll is concerned, is a *mere estate at will*, so far as the legislative power is concerned or the general demand of the public interest may require."

The state, then, in conferring upon these corporations two of the most powerful and important prerogatives of sovereignty, became as much their founder, donor, and patron as the men who subscribed to their capital stock. And here again we find the state's right of visitation and control. By the Dartmouth College case — for since that is the sole authority of our opponents I am bound that they shall have enough of it — we find the common law right of regulating whatever a man might found or endow strongly set forth. Mr. Webster said in the argument: "In early times it became a maxim that he who gave the property might regulate it in the future. *Cujus est dare, ejus est disponere.* The right of visitation arises from the property. It grows out of the endowment." Mr. Justice Washington also said: "This right of government and visitation arises from the property which the founder had in the lands assigned to support the charity; and as he is the author of the charity, the law invests him with the necessary power of inspecting and regulating it." Can there be anything more certain, then, than the right of the state to regulate railroads? It possesses this right not only because it is supreme, but because it was a patron. Does any one deny that it was a patron and assert that it gave the railroads no more than George the Third gave Dr. Wheelock,— a mere act of incorporation? Then let him take away from the railroads the right to hold the lands upon which they entered against the owner's will, and let him take away from them the right to take tolls, and where will they be? The mere monetary investment, immense though it might be, would then exist but as a paralyzed, weak, and powerless thing and everybody would wonder what it ever was begun for.

It is, therefore, the inevitable logic of every case, and of the nature of the corporations, that they are public and subject to public control. And such is becoming the prevailing sentiment of the people. The Hon. Matt H. Carpenter, United States Senator from Wisconsin, but gives voice to this sentiment when he says:

"Corporations, as they are recognized by our laws, are creations of man and only of man. It is absurd to say that corporations have any natural rights, *i. e.*, rights not derived from the law, rights the law cannot take away. Corporations are mere human contrivances, and, so far as natural rights are concerned, as subject to the power which created them as a house is subject to the will of its builder or owner. The power which creates a corporation is as absolute as the power of the potter over common clay."

The Hon. Charles W. Willard, our own distinguished representative in Congress, but expresses this sentiment when he says:

"The state created and chartered the corporation, and of course it can regulate the corporation. It can put limits to it. It can appoint what it shall do and what it shall not do. The fact of the power does not rest on the right of the state to regulate commerce, but on its sovereign power over the artificial person existing only by virtue of its creative act, and which must, therefore, necessarily be subject to every regulation which it may see fit to make."

THE RIGHT TO CONTROL ONE'S OWN PROPERTY.

This, then, in my humble judgment, completely disposes of the objection that the state has, in any instance, irrevocably disposed of its essential right to control its railroads in matters affecting the public interest, and now the only other legal, constitutional, or technical objection that remains is, as suggested by the Senator from Windsor [Mr. Wilson], that the state cannot rightfully prohibit a natural or an artificial being from giving away its own property if it shall choose to do so.

I suppose that this assumption is based upon that provision in our Bill of Rights that "every member of society hath a right to be protected in the enjoyment of life, liberty, and *property*." But so far from that declaration's being an argument against this bill, it seems to me to be one of the strongest arguments in its favor. Whose property is it that a railway manager parts with when he gives a pass? Is it his? Never, except in such small degree as he may be an owner in the road. And unless we are prepared to believe that all the owners will authorize such a depletion of the revenues of the property as is now caused by the extent to which this doubtful privilege is abused, then we are bound to extend to the owners of that property the inhibition of sovereign power against its waste. That same Bill of Rights declares that "acquiring, possessing, and protecting property" is one of the "inalienable rights," and if I had any doubt of the power of the legislature to regulate such an important matter of public policy as this, the doubt would be completely dissipated by the fifth article of this organic law, which declares that "the people of this state, by their legal representatives, have the sole, inherent, and exclusive right of governing and regulating the internal police of the same."

THE PAST POLICY OF VERMONT.

What has been the policy and practice of the state in this matter of railroad supervision and control? Has it been special, according to their several charters? Has it been narrowed down to the mere reservations in the grant? Has it been "hands off" for one or two and "hands on" for all the rest? Not at all. From 1845 to this day there has not been a session of the General Assembly that has not been fruitful of railroad legislation. We tell the companies what kind of trains they shall run, and how fast and how slow. We oblige them to connect with other roads whether their managers shall think it for their interest or not. We prescribe the manner of constructing the tracks and bridges, even though our method puts them to great expense. We even invade those "sacred" charters by telling the corporations that they shall not charge more for a less distance than for a greater. We assert our sovereignty over their franchise of taking toll so far as to compel them to carry the mails, whether they shall agree upon the price or not. We even interfere with their revenues by prohibiting them from transporting certain kinds of merchandise. And after all these things, shall it be said that we have not the right to prevent their managers from squandering their property to corrupt the state?

THE DOCTRINE OF CONSENT.

There is one other legal proposition and then I am done with that already too prolix portion of the argument. If it be true that certain charters are contracts between the state and the corporations, and that the state has now no further control than it then reserved, what is there to hinder the parties to the contract from making a further trade? The state has no way to make proposals but through its legislature. If they are accepted, they become a contract, and therefore the law of the corporation. If not accepted, and if that corporation has any power to reject them, then they are still good and operative upon all such corporations as have not such power. So that, upon any hypothesis, whether the rightful one of state sovereignty or the mistaken one of chartered independence, it is perfectly constitutional and proper for the legislature to pass this bill, and if any corporation chooses not to accept but to defy it, there will then be an issue upon which all these questions, which to my mind are no questions at all, can be settled by the courts.

MAGNITUDE AND DANGER OF THE FREE PASS ABUSE.

But, sir, is it not unfortunate for those who especially embrace the cause of the railroads in denying the right of legislative supervision, that the issue should be made upon such a harmless bill as this, a bill which invades no property, which strikes at no revenues, and which aims at nothing but what ought to be welcomed by all, as I have reason to believe that it is by most, as a boon and a blessing? The free pass abuse has attained gigantic proportions. Some of our railroads are so situated that a proper regard for the rights of the owners has been subordinated to a supposed necessity on the part of the managers of securing and holding the favor of public men. Thus a custom which began in a small way, and was confined within reasonable limits, has grown and extended until it is a grievous burden, and honest railway officials will tell you that they are never free from importunity. One of my neighbors who is quite a traveler informs me that many a time he has seen from one fourth to one half of all the passengers in the car riding free. Passes are given almost entirely for either personal or political reasons and with comparative infrequency on account of any necessity or convenience connected with the actual business of the road. In cases of controversy the railroad managers employ passes freely as means of influence against the owners of the property that they manage. A distinguished ex-judge of this state told me recently that the manager of one of the roads a few years since — and it is the most noted of all our roads for its prudence (" stinginess," some have called it) in this respect — issued as many as three thousand annual passes when they had some public measure to promote before the coming legislature. The evidence before the legislative investigating committee of two years ago, which for some mysterious reason has been withheld until this week, and cannot now be issued before adjournment, shows that another railway management grants passes to all the state officers and their families, to each judge of the supreme court and his family, to United States officials within the state, to one or more representatives of nearly every newspaper in the state, to many members of the legislature, and to almost every prominent lawyer and politician. Had such a disclosure as that been made in England, even during the days of the East India Company, it would have caused an appeal to arms. But it has grown up in virtuous Vermont so gradually and so unheeded that senators have been made to say upon this floor that they knew of no necessity for the enactment of this bill. Why, sir, to such a depth of moral degradation has the practice descended that I am informed by a friend that he can name three traveling liquor agents who ride from one end of the state to the other without paying any fare. The investigating committee of the last legislature reported as follows:

" How this record compares with the practice of other roads we have no means of knowing. We would, however, recommend that the whole system be abolished. When railroad managers bestow a pass they part with so much property of the road, and quite as often as otherwise the consideration is more personal to the officials than advantageous to the interests of the management.

" Its tendency is to create a privileged class and it undoubtedly tends to give railroads an undue political influence.

" Such a state of affairs, we believe, to be opposed to a sound policy."

Now, what is the effect of all this upon the public? Can it be anything but favoritism, bias, injustice, demoralization, and servitude? A pass has value; its acceptance implies obligation. It may not be given as a bribe; it may not be accepted as a bribe; but it is all the more insidious and luring and therefore all the more dangerous. Do you say that any man who is fit to sit in the legislature,

or in the editorial chair, or at the helm of justice, is above the influence of a pass? I hope all such are, but if railway managers think they are, then why do they not leave them alone and bestow their gifts upon the poor? Gladly would I believe that a pass does not render the pen subservient to suppress the truth or whitewash wrong, for it is pleasant to exclaim with Saxe:

> "Long may it be ere candor must confess
> On freedom's shores a weak and venal press."

And as for our judges, I know they do not think of wrong in accepting a trifling courtesy, that apparently costs nothing, and yet enables them to subsist upon the too parsimonious wages of the state. I know that they are generally men of high honor and unimpeachable integrity; but somehow history singles out for admiration that trifling act of thoughtful impartiality in Judge Collamer, when he dared not try a certain case until he had returned his pass. I cannot believe that a judge or a senator would knowingly be biased by a pass, but "a gift doth blind the eyes of the wise." The whole question is in a nut-shell: if you and I were contending suitors, and you should hear that within a year I had presented the judge with a horse worth two hundred dollars, would you feel exactly safe to let him try your case?

THE DUTY OF THE STATE.

But I will not enlarge upon this theme. It is not pleasant. You know, Mr. President, every senator knows, every person of ordinary observation knows, that the privilege has become an abuse, and the abuse has grown too great. I hope that I have been able to make it apparent that we have the right, and it is our duty, to strike it down. Other states are trying to do it; why should Vermont, whose good name is our proud boast everywhere, and whose honor so many of us and our sons have upheld on fields of blood, why should Vermont, which hardly ever knew a slave, hesitate to pass this emancipation act and be entirely free? Well did John Quincy Adams say that "no public man could take gifts without peril." Well did Washington say: "Under whatever pretense, and however customarily these gifts are made in other countries, if I accepted this should I not henceforward be considered as a dependent?" Well did Charles Sumner say: "But whether from ruler to subject, or from subject to ruler, the gift is equally pernicious. A public man can traffic with such only at his peril." Well did Shakespeare say:

> "No gift to him
> But breeds the giver a return exceeding
> All use of quittance."

Well does the Bible say: "Surely oppression maketh a wise man mad; and *a gift destroyeth the heart.*"